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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 98

UNION PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the United States moves that the judgment of the United States District Court for the Southern District of Iowa, Western Division, be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 12–27) is not yet reported.

JURISDICTION

This suit was brought by the United States pursuant to § 3 of the Elkins Act (49 U.S.C. 43) to enjoin alleged violations by the Union Pacific Railroad of § 6(7) of the Interstate Commerce Act (49 U.S.C. 6(7)) and § 1 of the Elkins Act (49 U.S.C.

41). The district court entered a final decree granting the relief sought on April 3, 1959 (J.S. App. 34–35). Notice of appeal was filed in the district court on April 10, 1959. The jurisdiction of this Court rests upon 49 U.S.C. 43 and 45.

QUESTIONS PRESENTED

1. Whether, under § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (49 U.S.C. 6(7), 41)—which forbid the furnishing of "privileges or facilities" not authorized by tariff, the transporting of property at less than the filed rate, and the giving of a "concession" to the "advantage" of a shipper—a carrier may, without having specified such service in its filed tariff, intentionally delay a shipment in order to afford the shipper additional time in which to find a buyer for the commodity and reconsign the shipment.

2. Whether an action under § 3 of the Elkins Act (49 U.S.C. 43), brought by the United States at the request of the Interstate Commerce Commission to enjoin a carrier from offering services not provided for in its filed tariff unless and until a new tariff specifying such services has been filed with the Commission and become effective, invades the primary jurisdiction of the Commission.

STATUTES INVOLVED

Sections 6(1) and 6(7) of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6(1), 6 (7)) and §§ 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) are set forth in pertinent part in the Appendix, *infra,* pp. 17–19.

STATEMENT

At the request of the Interstate Commerce Commission, the United States commenced this action seeking an injunction to restrain the Union Pacific Railroad from violating § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (*infra*, pp. 17–18). The alleged violations were grounded on the railroad's practice of extending to transit lumber shippers and wholesalers privileges and facilities in the transportation of property not specified in the Railroad's tariffs and the practice of granting and giving concessions, advantages and discriminations prohibited by statute. The relevant facts are as follows:

1. Numerous small lumber mills in the Northwest area of the United States, mainly Northern California, Oregon and Washington, use the so-called "roller" method of lumber marketing, in which a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the lumber shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through diversion or reconsignment instructions to the railroad while the shipment is en route (J.S. App. 2–3).

Most of this lumber moves to markets East of the Missouri and Mississippi Rivers over lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes to the lumber markets. The Union Pacific Railroad has the shortest physical route to these markets and therefore is able to deliver the lumber under certain conditions in the shortest time

(J.S. App. 3). Other railroads competing with Union Pacific for this lumber business have, in varying degree, longer physical routes, and the delivery of lumber thus takes a proportionately longer time over their routes (J.S. App. 3).

Following World War II, lumber shippers increasingly shipped by the longer circuitous routes in order to gain additional time in which to find a market for the lumber which was in transit. In order to meet the competition of the longer and therefore more time-consuming routes, Union Pacific offered to transit wholesalers of lumber a special delayed service whereby Union Pacific intentionally delayed shipments of lumber in transit on its lines in order that the lumber wholesalers might have additional time to find a market for their product (J.S. App. 4–5). The delayed service was normally accomplished by setting loaded cars out at various sidings along the main line until the shipper found a sale, whereupon the cars would be restored to normal service.[1] Although the delayed service was available to all shippers, the main users of the service were certain lumber shippers (J.S. App. 9–10). By February 1954, the delayed service schedule had been increased to 14 days (J.S. App. 6–7). Union Pacific was continuing to provide that service when this suit was instituted, and, unless

[1] For part of the period (October 1951–December 1953), the shipments were actually shipped over more circuitous routes, but shipment over the main lines, with the cars being set out on sidings, was found to be more economical (J.S. App. 6). The delayed service was suspended entirely for brief periods (July 1950–October 1951 and June 1956–December 1956) (J.S. App. 5–7).

restrained, was likely to continue to do so (J.S. App. 9).

Union Pacific has published and filed with the Interstate Commerce Commission, tariffs, rates and charges, rules and regulations governing the line haul transportation service and accessorial services, including diversion, reconsignment and demurrage, applicable to lumber and other commodities in car load lots transported from Oregon, Washington and other Western states (J.S. App. 9). Those tariffs do not specify operating time schedules or offer, or make any other provision for, slower-than-normal service (J.S. App. 9).

2. The district court found that, by its intentionally delayed service, Union Pacific contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers and wholesalers and thus assumes warehousing and inventory maintenance costs for a segment of the lumber industry at no expense to the lumber dealers; that the delayed service is a device whereby transit lumber dealers avoid the payment of demurrage and obtain other advantages, such as having their lumber on wheels ready for diversion to any potential market, placing them in a superior competitive position in the marketing of lumber; that the contribution of trackage and cars to the lumber dealers results in added carrier operational problems and costs occasioned by the need for additional power and working crews; and that the delayed service entails the payment of excessive per diem costs for the use of foreign cars to the economic disfavor of Union Pacific and to the detriment of the national policy to

maintain economically stable transportation facilities (J.S. App. 7–8).

The court concluded that Union Pacific's delayed lumber service "constitutes a device by which defendant extended and will continue to extend to lumber transit shippers, privileges and/or facilities in the transportation of property such as are not specified in published tariffs" in violation of § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (J.S. App. 28–29). The court also concluded that the delayed service is a device whereby shippers are enabled to transport lumber "at less than the published rates on file with the Interstate Commerce Commission and whereby such transit shippers of lumber have been given and will continue to be given advantages, and whereby discrimination is practiced in favor of such transit lumber shippers, all in violation of the Elkins Act" (J.S. App. 28).

Accordingly, the district court, pursuant to § 3 of the Elkins Act (*infra*, pp. 18–19), permanently enjoined Union Pacific from granting and giving delayed lumber freight service and from extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges and facilities" (J.S. App. 34–35).[2]

[2] On April 14, 1959, the district court, on appellant's motion, stayed its order of April 3 for a period of six months or

ARGUMENT

1. The finding that Union Pacific, by offering to shippers a delayed service not provided for in its filed tariff, violated § 6(7) of the Interstate Commerce Act (*infra,* pp. 17–18) and § 1 of the Elkins Act (*infra,* p. 18) is clearly correct.

a. Section 6(7) of the Interstate Commerce Act makes it unlawful for a carrier to "extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in" the carrier's filed tariffs.[3] Patently, the delayed service offered by Union Pacific is such a "privilege" or "facility"—to wit, the free use of the carrier's cars for storage of lumber until a sale can be found. That regular operating time schedules are not required to be filed is irrelevant. It is necessarily implicit in the tariffs that the rates apply to the carrier's "normal" service, and it is only the giving of special service—expedited or delayed—that requires additional specification.[4] Nor is it material

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until a final disposition of the appeal by this Court, "whichever is sooner."

[3] Section 6(1), in turn, requires that the filed tariff "state separately * * * all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee" (49 U.S.C. 6(1)).

[4] Cf. *United States* v. *Michigan Portland Cement Co.*, 270 U.S. 521, 524:

> * * * There is nothing in the statute that indicates the necessity of a published tariff which should expressly recite the fact that no unfair or unequal concession or advantage in the distribution of coal cars to shippers, or in the pri-

whether or not the service is in fact offered equally to all shippers. The purpose of requiring such services to be specified in published tariffs is to avoid the *opportunity* for discrimination by enabling each shipper to know the precise terms on which the service is offered to others and to which he is entitled. It is equally essential that such services be prescribed in the tariffs so that the Commission may have an opportunity to pass upon the reasonableness of furnishing them without extra charge.[5]

The delayed service is equally a violation of § 1 of the Elkins Act, which makes unlawful the giving of any "concession" whereby property is "by any device whatever" transported at a rate less than the tariff rate or whereby "any other advantage is given." That the "concession" of delayed service is an "advantage" given shippers follows from the same reasons that it is a "privilege or facility" forbidden to be given, without tariff provision, by § 6(7) of the Interstate Commerce Act. So also it is a device for transporting property at less than the tariff rates. The furnishing of additional services not required to be given for the tariff rate is necessarily a *pro tanto* re-

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ority of their shipment, should be afforded. The fact that the advantage or discrimination is unlawful is plain from the description of its character, as shown in this indictment, without reference to the rates fixed in the tariff. * * *

[5] Appellant's claim that the delayed service was necessary to meet competition might be relevant to a determination whether a tariff provision providing for such service would be reasonable, but it can have no bearing on the necessity for specifying the service in the tariff. To the contrary, it emphasizes the significance of the special service offered and thus the importance of its being published in the tariff.

duction of the charge for the services required to be given: by giving normal services plus storage at the rate for the normal services alone, the carrier inevitably receives less for the normal services. The delay of the shipment en route can be most accurately described, indeed, as a device whereby the shipper avoids paying the demurrage charges that would be due if the cars were shipped in normal service and allowed to stand loaded at destination. The resulting discrimination against shippers who do not use the more costly delayed service but must pay the same rate for their direct shipments—plus demurrage if they fail promptly to unload the cars at destination—is obvious.

b. The decisions of this Court leave no room for doubt that the decision below is correct. Not only has the Court frequently reiterated the broad purposes of the Acts to reach any method of dealing by which advantages not provided by tariff provisions might be given,[6] but it has directly passed on and

[6] "The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. * * *" *New York, N.H. & H.R. Co.* v. *ICC*, 200 U.S. 361, 392. "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. * * * [T]he intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published." *Armour Packing Co.* v. *United States*, 209 U.S. 56, 72. See also *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 461–462.

condemned practices closely analogous to that here. Thus, in *Chicago & Alton R. Co.* v. *Kirby,* 225 U.S. 155, the Court held that a special contract to transport a car by a particular train, or on a particular day, was illegal when not provided for in the filed tariff (pp. 165–166):

> * * * the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.
>
> For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.
>
> * * * * *
>
> * * * To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs. * * *

In *Baltimore & Ohio R. Co.* v. *United States,* 305 U.S. 507, 526, the Court held that offering in-transit warehousing to shippers at a non-compensatory rate resulted, in effect, in lowering the receipts for the transportation itself to less than the tariff rate and thus violated §6(7) of the Interstate Commerce Act. *A fortiori,* offering free storage in cars set out on sidings en route results in an effective rate less than the tariff rate. And that the delay in shipment cannot be deemed an incidental aspect of the service provided for in the tariffs is established by this

Court's comments on an almost identical practice of allowing cars to be detained to meet the needs of lumber shippers in *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262:

> One cause of undue detention * * * is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. * * *

The state courts have also uniformly held illegal substantially identical practices not provided for by tariff, such as intentionally delaying the arrival of shipments to give the shipper the advantage of a better market price,[7] agreeing to leave a car temporarily on a siding en route solely to accommodate the ship-

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[7] *Eastern Shore* v. *New York, P. & N.R. Co.*, 141 Va. 611, 616. No special rate has been shown to have been published for special contracts to delay shipments, and hence no shipments could legally be delayed.

If it is unlawful to contract to expedite a shipment, it is unlawful to contract to delay it * * *. These cabbages were not diverted to another market, but the device adopted was one to delay their arrival in the market to which they were originally billed.

The possibility of discrimination between shippers, to delay one shipper's goods and to forward another's, is as great in this case as it is in case of a special contract to expedite. It is clearly unlawful and custom could not make it lawful.

per,[8] or agreeing to deliver a shipment within a specified time.[9]

2. Appellant's contention that the action of the district court invaded the "primary jurisdiction" of the Interstate Commerce Commission is without substance. The issue in this case is not whether a tariff providing for delayed service without additional charge would be reasonable or lawful, but only whether the service may be offered without being included in the tariff at all. The district court limited itself to that issue and expressly refrained from expressing any view whether the service would be rea-

[8] *Siebert* v. *Erie Railroad Co.*, 189 App. Div. 586, affirmed, 232 N.Y. 517. See also *Atchison, T. & S.F. Ry. Co.* v. *Springer*, 172 F. 2d 346, 349 (C.A. 7).

[9] *Louisville & N.R. Co.* v. *Warren County Strawberry Growers Asso.*, 206 Ky. 482, 485–486.

> * * * a carrier contracting to deliver a commodity within a specified time extends to the shipper an advantage and imposes upon itself an obligation not contemplated in the usual method of shipment. If in the tariffs of a carrier on file with the Interstate Commerce Commission there is no provision fixing the schedule of time for delivery of commodities shipped under those tariffs and if for that reason the carrier may contract with whomsoever it chooses to deliver within a specified time and decline to so contract with others with whom it may not desire to do so, the entire scheme of prevention of discrimination by carriers devised by the Federal Congress would be rendered of no value. Such shipments with delivery so contracted for would universally be given every service preference at the hands of the carrier. Such preference would be discrimination of the most pernicious character. * * * [To institute such a service] it is indispensably necessary that such be published as a part of the tariffs, and be filed with the Interstate Commerce Commission. Then such service would be open to the shipping public at large on equal terms.

sonable if provided for in a tariff (J.S. App. 27). By directing appellant to comply with the tariff filed with the Commission and to cease offering services not included in the tariff, the judgment below, far from infringing the Commission's jurisdiction, was directly in aid of that jurisdiction. The decree does no more than enjoin appellant from offering the delayed service until it files with the Commission a tariff providing for such service and the Commission has had an opportunity to pass upon its lawfulness. In short, this suit, brought at the request of the Commission itself, can best be characterized as a suit to require the carrier to invoke the primary jurisdiction of the Commission by filing a tariff providing for the challenged service.

Appellant relies heavily on the fact that six other carriers have filed with the Commission (after the commencement of this suit) tariffs providing for delayed service without additional charge and that the Commission has undertaken an investigation into the reasonableness of those tariffs.[10] That, however, only demonstrates the anomaly of appellant's position, for the effect of the injunction here is simply to require appellant to file a similar tariff and thus likewise submit to the Commission's power to determine the reasonableness of its delayed service.

Primary jurisdiction concepts, moreover, are only aids to determining Congress' presumed intent, and in this case Congress has expressly provided for suits

[10] *Lumber-Free Time Allowance at Hold Points*, Investigation and Suspension Docket No. 7050. By order dated October 27, 1958, the tariffs were suspended pending a determination of their reasonableness (J.S. App. 10).

of this character. Section 3 of the Elkins Act (*infra*, pp. 18–19), under which this suit was brought, provides that whenever the "Commission shall have reasonable ground for belief" that a carrier is performing transportation "at less than the published rates on file, or is committing any discriminations forbidden by law" an equity action may be brought by the United States in a district court, whereupon the court shall "summarily * * * inquire into the circumstances" and, if "satisfied of the truth of the allegations * * * shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination * * *." It is the very purpose of that section to provide a summary method to enjoin practices not authorized by a filed tariff and to require the carrier to proceed before the Commission, by filing new tariffs, if it wishes to adopt practices not presently authorized in the tariffs. If, as appellant contends, the district court cannot decide whether a practice is one that must be authorized by a tariff or results in a rate less than the filed rate, even for purposes of granting what is in effect interim relief pending further proceedings before the Commission, the very object of the section to provide a summary procedure for that purpose would be defeated.

Finally, even if there were no express statutory direction for the district court to decide such issues, the issue in this case is one that would not be required to be referred to the Commission even under the general principles of primary jurisdiction. There is no need to refer to an agency a matter on which its views have already been clarified (*United States* v. *Western Pa-*

cific R. Co., 352 U.S. 59, 69), and in this case the Commission's views are abundantly clear. Not only has the Commission repeatedly condemned intentional delays of shipment to suit a shipper's needs [11] and reaffirmed those views by requesting that proceedings be instituted against appellant, but the very proceeding now pending before the Commission on which appellant so heavily relies—in which the delayed-shipment tariffs filed by six other carriers were suspended pending a determination of their reasonableness—demonstrates the Commission's view that such service is properly the subject of a tariff provision and, indeed, raises serious questions of lawfulness even when provided for in a tariff. Whatever may be the outcome of the Commission's inquiry into the reasonableness or lawfulness of affording delayed shipments at no additional cost under a filed tariff provision, there can be no room for doubt that the Commission views the furnishing of such service without a tariff provision to be plainly unlawful. To refer that issue to the Commission would be an empty formalism, affording only a further delay during which appellant could continue its unlawful acts, a delay which it was the very purpose of § 3 of the Elkins Act, by providing summary procedures, to avoid.

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[11] See, *e.g.*, *Chicago, M., St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 487; *Railroad Operating Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, 375; *Reconsignment Case*, 47 I.C.C. 590, 624; *Export Grain Storage Charges*, 42 I.C.C. 530, 543; *American Paper & Pulp Association* v. *B. & O. R.R. Co.*, 41 I.C.C. 506, 511–513. The cases are discussed in the district court's opinion at J.S. App. 19–21.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal does not present a substantial question. The judgment of the district court should be affirmed.

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JULY 1959.

APPENDIX

Section 6 of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6) provides in part:

> SEC. 6. (1) Every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *.
>
> * * * * *
>
> (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges

which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

Sections 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) provide in part:

SEC. 1. * * * The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor * * *; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. * * *

* * * * *

SEC. 3. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court

of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings * * *.

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